UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CASE NO. 3:06MJ-230-R

UNITED STATES OF AMERICA PLAINTIFF

v.

STEVEN D. GREEN DEFENDANT

MEMORANDUM OPINION

This matter is before the Court on Steven D. Green's Motion to Quash Grand Jury Subpoenas to his Father, Stepmother, Brother, and Sister. The United States has filed a response to which Green has replied. This matter is now ripe for adjudication. For the reasons that follow, Green's Motion to Quash is **DENIED**.

BACKGROUND

On July 19, 2006, the United States filed an unopposed motion seeking an additional ninety days to investigate the allegations against Green. In obtaining the acquiescence of Green's counsel to this extension, the government represented that the additional time was necessary because the evidence and witnesses were in Iraq. The additional time was granted, the Court finding that "given the existence of the parallel military prosecution in Iraq with witnesses and evidence located in Iraq, it is unreasonable to expect return and filing of an Indictment within the thirty-day period provided for by the Speedy Trial Act."

On October 26, 2004, Green filed a motion seeking to quash three grand jury subpoenas. These subpoenas sought the testimony of Green's father, stepmother, and brother. The subpoena to Doug Green, Steven D. Green's brother, also required the witness to bring to the grand jury "any correspondence, including but not limited to, cards, letters or e-mail messages received from Steven

D. Green between May 2005 and continuing to the present." On October 30, 2006, Green filed a motion to join his sister with the original motion to quash as she had recently been served with a grand jury subpoena. This Court subsequently granted that motion.

DISCUSSION

I. RELEVANCE

The grand jury's responsibilities include "the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions." *United States v. Calandra*, 414 U.S. 338, 343 (1974). "The law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority." *United States v. R. Enters., Inc.*, 498 U.S. 292, 300-01 (1991). Thus, a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of demonstrating the claimed impropriety is on the challenging party. *Id.* at 301.

Green challenges the subpoenas on the ground that the testimony sought is only relevant to the penalty phase. When a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the court determines that "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *Id.*

Green has not demonstrated that the grand jury testimony of his family members is not relevant to whether he committed the crime. Green bears the burden of showing that the challenged witnesses were not called to accomplish a proper objective. *United States v. Breitkreutz*, 977 F.2d 214, 217 (1992). Although Green argues that the United States is seeking the testimony solely for strategic advantage at a penalty phase, he has failed to show that his family members lack

information about his participation in the crime. *See id.* ("Defendant has offered nothing beyond [his] own unproved suspicions to prove that [the witnesses] were improperly summoned before the grand jury for the sole or dominant purpose of preparing the pending indictment[] for trial." (internal quotation omitted)).

Furthermore, the scope of the grand jury's investigation in capital cases has expanded in light of *Ring v. Arizona*. In *Ring*, the Court held that, for purposes of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), aggravating factors operate as the functional equivalent of an element of a greater offense, and therefore must be found by a jury under the Sixth Amendment. *Ring v. Ariz.*, 536 U.S. 584, 609 (2002). In federal prosecutions an aggravating factor must be charged in the indictment. *United States v. Cotton*, 535 U.S. 625, 627 (2002). Therefore, relevant evidence on those factors must be presented to the grand jury. Relatives may be in the position to provide that evidence.

Therefore, this Court finds that Green has failed to demonstrate that there is no reasonable possibility that the subpoenas to Green's father, stepmother, brother, and sister will produce information relevant to the general subject of the grand jury's investigation.

II. SCOPE OF THE EXTENSION

Green argues that the subpoenas "fly in the face of the understanding of the parties with regard to the lengthy, and unopposed, extension of time for return of the indictment." Green indicates that his acquiescence to the delay was based on the need to obtain evidence from Iraq and objects to the Government's use of this extension to take grand jury testimony from his family members.

Although this Court granted a continuance based on the parallel military prosecution in Iraq and the witnesses and evidence located in Iraq, there was nothing in the continuance requiring all

American witnesses to testify within the original thirty day period. Nor does the continuance become invalid because the Government presented witnesses and other evidence to the grand jury that did not originate in Iraq. *See United States v. Marin*, 7 F.3d 679, 685 (7th Cir. 1993) ("[T]here is nothing in the Speedy Trial Act which says that a continuance valid when granted becomes invalid *ab initio* if . . . contingencies not foreseen when the continuance was asked for and granted . . . arise that prevent the government from using the continuance for the purposes for which it was granted.") (quoting *United States v. Carlone*, 666 F.2d 1112, 1115 (7th Cir. 1981)).

Therefore, this Court finds that the stated purpose of the delay does not preclude Green's family members from testifying before the grand jury.

III. EVIDENTIARY PRIVILEGE

Green also appears to suggest that an evidentiary privilege exists that would permit his family members to refuse to testify against him before the grand jury. The Sixth Circuit does not recognize a parent-child evidentiary privilege. *United States v. Ismail*, 756 F.2d 1253, 1258. The Sixth Circuit also does not recognize a sibling privilege. *See id.* (stating that "the vast majority of federal courts have refused to recognize a family privilege under F.R.E. 501 extending beyond the spousal privilege").

Therefore, this Court finds that there is no claim of privilege which Green or his family members may assert to prevent them from testifying before the grand jury.

IV. GRAND JURY SUBPOENAS DUCES TECUM ISSUED TO DETENTION FACILITY

In his motion to quash, Green asserts that any grand jury subpoenas duces tecum issued to his detention facility for recordings of his telephone calls would be improper. In his motion, Green acknowledges that inmates at the detention facility are warned that their phone calls may be

monitored and recorded, however Green indicates that they are not warned that everything that they say during these phone calls is subject to being turned over the to the United States Attorney's Office.

Monitoring of inmates' calls does not violate the Fourth Amendment. *See United States v. Paul*, 614 F.2d 115, 116 (6th Cir. 1980) ("It still appears to be good law that so far as the Fourth Amendment is concerned, jail officials are free to intercept conversations between a prisoner and a visitor."); *United States v. Van Poyck*, 77 F.3d 285, 291 (9th Cir. 1996) (holding that any expectation of privacy in outbound calls from prison is not objectively reasonable and therefore the Fourth Amendment is not triggered by the routine taping of such calls); *United States v. Willoughby*, 860 F.2d 15, 20-21 (2d Cir. 1988) (holding that jail officials may record pretrial detainee's telephone calls). The prison has a compelling interest in monitoring these calls due to the security concerns raised by the inmates' use of telephones. *See Van Poyck*, 77 F.3d at 291; *United States v. Amen*, 831 F.2d 373, 379-80 (2d Cir. 1987). Additionally, the inmates' knowledge of the detention facility's recording practices removes any reasonable expectation of privacy in their calls. *See Van Poyck*, 77 F.3d at 290.

The facility's recording of the inmates' calls also does not violate Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C. §§ 2510-2522. Under that statute, wire communications may be intercepted by an investigative or law enforcement officer in the ordinary course of his duties without a court order. 18 U.S.C. § 2510(5)(a); *see Paul*, 614 F.2d at 117 ("[W]e conclude, as did the district court, that the monitoring took place within the ordinary course of the Correctional Officers' duties and was thus permissible under 18 U.S.C. § 2510(5)(a)."); *see also Adams v. City of Battle Creek*, 250 F.3d 980, 984 (6th Cir. 2001) ("Congress

most likely carved out an exception for law enforcement officials to make clear that the routine and almost universal recording of phone lines by police departments and prisons, as well as other law enforcement institutions, is exempt from the statute."). Because the recording did not violate the provisions of Title III, the detention facility is free to disseminate it to the grand jury. *See United States v. Hammond*, 286 F.3d 189, 193 (4th Cir. 2002) ("[T]he FBI was free to use the intercepted conversations once they were excepted under . . . § 2510(5)(a)(1)").

Therefore, this Court finds it is proper for jail officials to comply with the grand jury subpoena and disclose the recordings to agents with the Federal Bureau of Investigation.

CONCLUSION

For the foregoing reasons, Green's Motion to Quash is **DENIED**.

An appropriate order shall issue.

Thomas B. Russell

Thomas B. Russell, Judge
United States District Court
October 30, 2006

ENTERED
OCT 30 2006
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

faxed to counsel ks